



October 25, 2005

Mr. Sam Leto  
Fiscal Services Division  
Legislative Services Agency  
Ola Babcock Miller Building  
Des Moines, Iowa 50319

Dear Mr. Leto,

I wish to thank you and the Government Oversight Committee for the opportunity to provide input on the ABA's Model Procurement Code on behalf of the Iowa League of Cities.

**Significant Features of ABA Model Procurement Code:**

In commenting on the ABA Model Procurement Code (Model Code), I would first highlight some of its most significant features.

- The Model Code is a very broad and comprehensive, covering the procurement of a broad range of "supplies, services and construction". Supplies would include goods, materials and equipment which are now procured by cities without any regulation other than purchasing or procurement ordinances or policies which many cities have themselves adopted. "Services" would include professional services for the design of what are now referred to as "public improvements" under Chapter 384 of the Iowa Code, while "construction" would include the procurement of construction services for such "public improvements".
- The Model Code would potentially apply not only to the State of Iowa and its agencies, but to all governmental subdivisions in the state, including cities.
- The Model Code would establish a uniform procurement system with uniform procurement procedures throughout the State, and would supplant and replace a number of existing and well established procurement systems under both State and local law. Section 1-107 of the Model Code would likely repeal existing State procurement provisions which are inconsistent with the Model Code, such as the Chapter 384 competitive bidding requirements applicable to municipal public improvements. Depending on which Alternative is chosen under Section 1-104 of the Model Code, its adoption could also pre-empt city purchasing and procurement ordinances and policies deemed to be inconsistent with the Model Code.

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- The Model Code would create the state-wide office of chief procurement officer with broad powers to adopt regulations governing the procurement, management, control and disposal of any and all supplies, services and construction.
- The Model Code would also create a state-wide procurement appeals board with jurisdiction to review and determine de novo (a) the protest of a solicitation or award of any contract by a prospective or aggrieved actual bidder; (b) an aggrieved party's appeal of a protest determination, a debarment or suspension determination, or the determination of a contract or breach of contract controversy.

#### **League Comments and Concerns:**

- A major concern of the League is that the Model Code would be adopted in such fashion as to repeal existing State procurement laws or pre-empt local ordinances and policies, resulting in the immediate disruption of procurement activities by cities throughout the State.
- A related concern is with respect to that body of caselaw (common law) which has developed to help explain and apply the various existing procurement provisions in the Iowa Code (e.g. Chapter 384 competitive bidding requirements applicable to municipal public improvements). The continuing application of that body of caselaw, particularly the common law associated with Chapter 384 competitive bidding, would be put in doubt upon adoption of the Model Code, and would be further complicated by the adoption of state-wide regulations.
- Finally, the traditional role of Iowa's courts in adjudicating disputes associated with the procurement of "supplies, services and construction" under the existing body of established precedent would be changed, with the state-wide procurement appeals board making initial de novo determinations, and with district courts relegated to the role of reviewing the record. This change in the jurisdiction of our courts, when combined with the broad regulation-making authority of the chief procurement office, would very likely make most, if not all, established precedent inapplicable. Section 1-102 of the Model Code would not operate to make such precedent applicable.
- Most of Iowa's larger cities already have formal purchasing policies in place to address the issues raised in the Model Code. Of 11 larger cities surveyed, 9 indicated that they either had a purchasing policy or a procurement ordinance in place. Most of the respondents indicated that they would not be in favor of state-mandated requirements that would be pre-empt local policies or ordinances.
- Smaller cities do not have staff in place to deal with the sophisticated procurement requirements reflected in the Model Code. Implementation of the Model Code would require additional staffing and/or training in many cities to

comply with Model Code requirements, resulting in higher procurement system costs to those cities

**Conclusion and Recommendation:**

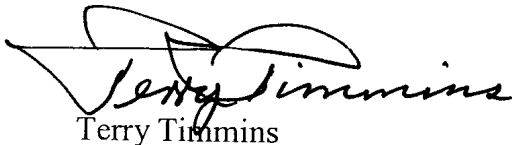
The sudden introduction of such fundamental and broad-reaching changes into the existing system of State and local procurement would introduce considerable uncertainty, would likely result a multitude of requests for adjudication by the state appeals board, and would likely bog down the procurement process at the State and local level for a considerable period of time until clarifying regulations could be adopted and until all of the resulting issues could be fully adjudicated. Clearly, if such comprehensive changes are to be undertaken, an effort should be made to put in place as many of the procedural elements and as much of the regulatory content of the new system as is possible prior to the effective date of the Model Code. Such an undertaking would require the involvement of all stakeholders in the current procurement system.

Given the degree of effort that would be involved in such an undertaking, two questions need to be asked:

- What are the problems with the existing procurement system which require correction ?
- Is it necessary to inaugurate an entirely new procurement system to correct those problems ?

I want to express my appreciation for the opportunity the Committee has provided to review and comment on the Model Code. Should you need any further information or analysis, please do not hesitate to call on me.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Timmins", written over a horizontal line.

Terry Timmins  
Associate General Counsel  
Iowa League of Cities